

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
Nora Mead Brownell, Joseph T. Kelliher,  
and Suedeem G. Kelly.

Montana Power Company

Docket No. SC00-1-001

ORDER AFFIRMING INITIAL DECISION

(Issued January 28, 2004)

1. This case is before the Commission on exceptions to an Initial Decision issued November 1, 2002.<sup>1</sup> This case involves Montana Power Company's (Montana Power's)<sup>2</sup> claim of stranded costs from two long-term wholesale power customers who terminated their contracts with Montana Power. For the reasons discussed below, the Commission will affirm the Administrative Law Judge's (ALJ) decision to grant summary disposition on the basis that Montana Power failed to establish that it had a reasonable expectation that the contracts with the Cooperatives would last past their potential termination terms.

**Background**

2. Montana Power has had a full requirements power supply agreement with Central Montana Electric Power Cooperative, Inc. (Central Montana) since January 1974. The agreement had an initial ten-year term, and continued indefinitely thereafter, unless terminated with five years' written notice. On June 22, 1995, Central Montana notified Montana Power that it would terminate the agreement. Montana Power has had a partial requirements power supply agreement with Big Horn County Electric Cooperative, Inc. (Big Horn) (Central Montana and Big Horn are referred to collectively as the Cooperatives) since June 1982. The agreement had no initial term and was to remain in effect indefinitely, unless terminated with three years' written notice. On December 12, 1996, Big Horn notified Montana Power that it would terminate the agreement.

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<sup>1</sup> Montana Power Company, 101 FERC ¶ 63,015 (2002).

<sup>2</sup> In February 2002, NorthWestern Energy, LLC acquired the electric utility operations of Montana Power Company and therefore has succeeded to all of the rights and obligations of Montana Power Company with respect to the matters in this proceeding. For purposes of consistency, we will refer to the company as "Montana Power" throughout this order.

3. On April 21, 2000, Montana Power filed a request for authorization to recover stranded costs from Central Montana and Big Horn, in the amount of \$23,801,865 (\$21,640,180 from Central Montana and \$2,161,685 from Big Horn). Montana Power explained that these stranded costs were based on the amount of its generation-related costs that were not recovered when it sold its assets in 1999. Historically, Montana Power has been engaged in the generation, transmission and distribution business. In 1999, in conjunction with the retail restructuring program in the state of Montana, Montana Power sold substantially all of its generation assets, for approximately \$118 million over book value.<sup>3</sup> Montana Power, however, was unable to divest certain qualifying facility (QF) power purchase agreements or the Milltown Dam near Missoula, Montana.

4. Montana Power argued that it was entitled to recover these stranded costs from the Cooperatives because: (1) at the time Montana Power invested in the pertinent assets, it had a reasonable expectation that the Cooperatives would continue to take service from Montana Power; (2) it had included the Cooperatives' loads in rate proceedings involving integrated least cost planning before the Montana Public Service Commission; and (3) its contracts with the Cooperatives contained "evergreen" provisions that automatically renewed the contracts in the absence of a notice of termination. Montana Power also contended that the Commission's revenues lost methodology for calculating stranded costs was not appropriate in this case, and sought a waiver of Section 35.26 of the Commission's regulations,<sup>4</sup> which prescribes the revenues lost methodology for recovery of stranded costs.

5. The Cooperatives protested Montana Power's attempt to recover stranded costs from them arguing that, since Montana Power voluntarily exited the electric industry and abandoned its customers when it sold its assets in 1999, Montana Power should not now be allowed to seek to recover costs from departing customers that it otherwise would have recovered in rates had it stayed in business. The Cooperatives also argued that the notice of termination clauses in their contracts rebutted Montana Power's argument that it reasonably expected to continue service to the Cooperatives. The Cooperatives then challenged the specific costs Montana Power was claiming as stranded costs, criticized Montana Power's proposal to use a methodology other than the Commission's revenues lost methodology for calculating such costs, and questioned Montana Power's attempt to recover these costs through a lump-sum payment.

6. On June 28, 2000, the Commission accepted for filing Montana Power's application for stranded costs, suspended it for five months, to become effective on January 25, 2001, subject to refund, and set the case for hearing on the issue of whether Montana Power may recover stranded costs from the Cooperatives and, if so, in what

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<sup>3</sup> Montana Power Original Filing at p. 10.

<sup>4</sup> 18 C.F.R. § 35.26 (2003).

amount.<sup>5</sup> Because the parties expressed an interest in attempting to settle the case, the Commission held the hearing in abeyance pending settlement negotiations. On March 22, 2002, the Chief Administrative Law Judge terminated the settlement negotiations.

### **Initial Decision**

7. On November 1, 2002, the ALJ issued an Initial Decision granting in part and denying in part a motion for summary disposition filed by the Cooperatives, and denying all relief for the recovery of stranded costs requested by Montana Power.<sup>6</sup> The ALJ found that Montana Power's failure to include the actual contracts with the Cooperatives in its Direct Testimony and Exhibits was a fatal evidentiary flaw that, in and of itself, meant Montana Power could not recover stranded costs. The ALJ went on to state that while the failure to file the contracts was a fatal evidentiary flaw, she did not rest her decision to summarily dismiss Montana Power's case on that basis. Instead, the ALJ continued her analysis of the record and the issues raised by the Cooperatives.

8. The ALJ held that the Montana Power/Central Montana contract was a "new" requirements contract pursuant to which stranded cost recovery is prohibited if the contract does not contain an exit fee or other explicit stranded cost provision.<sup>7</sup> The ALJ further noted that the notice of termination provisions in the contracts between Montana Power and the Cooperatives created a rebuttable presumption that no reasonable expectation of continued service existed, and held that Montana Power had not met its prima facie burden of proof establishing that it had a "reasonable expectation" that either of the contracts would last past their potential termination terms. Finally, the ALJ found that, since Montana Power did not present a revenues lost calculation in its case in chief upon which a finding in its favor could be made, Montana Power's direct case as to the methodology for determining stranded costs was fatally deficient.

9. Montana Power filed a brief on exceptions to the Initial Decision, and the Cooperatives filed a brief opposing exceptions. The Commission notes that, while Trial Staff participated in the proceeding before the ALJ, and opposed the Cooperatives' motion for summary disposition of Montana Power's stranded costs claim, Trial Staff did not file a brief on or opposing exceptions to the ALJ's Initial Decision.

10. In the Initial Decision, the ALJ noted that the notice of termination provisions in the contracts created a rebuttable presumption that no reasonable expectation of continued service existed. The Judge acknowledged that whether or not a contract

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<sup>5</sup> 91 FERC ¶ 61,296 (2000) (June Order).

<sup>6</sup> 101 FERC ¶ 63,015 (2002).

<sup>7</sup> 18 C.F.R. §§ 35.26(b)(7) and 35.26(c)(1)(ii) (2003).

contains an evergreen or other automatic renewal provision is a factor to be considered in determining whether the presumption of no reasonable expectation is rebutted in a particular case. However, the Judge concluded that an evergreen provision is only one factor in making a factual determination and, in and of itself, is insufficient to rebut the presumption in the absence of other persuasive evidence. In the Initial Decision, the ALJ found that Montana Power's contractual relationship with the Cooperatives was subject to renewal every year, and at any point in time, the Cooperatives had the right to give notice of termination. The Judge stated "[n]ot only did both the contracts at issue here contain an evergreen provision, they both required what was, in effect, a renegotiation on a yearly basis."<sup>8</sup> The Judge stated that the contracts required a yearly "meeting of the minds" before the parties could go forward for another year, even in the absence of a specific notice of termination, such as those given in June 1995 (by Central Montana) and December 1996 (by Big Horn).

11. The ALJ found the testimony presented by Montana Power witness Patrick Corcoran did not change the fact that "[i]f Montana Power purchased power or generation resources under contracts that lasted for extended years (which it did), it did so at its own peril, because the Cooperatives could walk away after only a short time (three and five years)." The ALJ ruled that "even viewed in the light most favorable to Montana Power, Mr. Corcoran's conclusory statements cannot meet the heavy burden the regulations place on Montana Power on this issue. This is a legal determination, not a factual, determination."<sup>9</sup> Accordingly, the ALJ concluded on the record before her that Montana Power had not met its prima facie burden to establish that it had a reasonable expectation that either of the contracts would last past their potential termination terms.

### **Positions of the Parties**

12. Montana Power challenges the ALJ's assumption that the contracts were subject to renewal every year, and required a yearly "meeting of the minds" before the parties could go forward another year. Montana Power maintains that Mr. Corcoran's testimony demonstrates that Montana Power had a reasonable expectation of continuing to serve the Cooperatives indefinitely. Montana Power argues that Mr. Corcoran's testimony shows that: (1) Montana Power entered into the contracts in 1974 and 1982 and supplied the needs of the Cooperatives in accordance with those contracts until terminated; (2) Montana Power did not distinguish between the Cooperatives' loads and the loads of its other retail native load customers for planning and resource acquisition purposes; (3) the contracts had evergreen provisions with no specific termination dates; (4) the Cooperatives had no practical alternative to Montana Power at the time Montana Power acquired its generation resources; (5) Montana Power had a regulatory obligation to continue to supply the cooperatives at the time Montana Power acquired its generation

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<sup>8</sup> Initial Decision, 101 FERC ¶ 63,015 at P 55.

<sup>9</sup> Id. at P 63.

resources; and (6) the Cooperatives had not expressed interest in alternative suppliers until recently. Montana Power contends that factors such as these have been found in other cases to demonstrate that a utility had a reasonable expectation of continuing to serve and to overcome any rebuttable presumption to the contrary.<sup>10</sup> Montana Power contends that the Initial Decision is contrary to the Commission's regulations and, therefore, should be reversed.

13. The Cooperatives argue that the ALJ applied the correct evidentiary standard under the stranded cost rules when the Judge held that Montana Power failed to provide testimony or other evidence that was sufficient for a prima facie showing of a "reasonable expectation" of continuing to serve the Cooperatives. The Cooperatives assert that the showing by a utility that it had a reasonable expectation of continuing to serve the departing customer beyond the contract term is one of the essential threshold elements of a stranded cost claim, and that the burden is on the utility to make that showing.

14. According to the Cooperatives, Montana Power ignores the fact that the termination provisions in the Cooperatives' contracts create a presumption against Montana Power. The Cooperatives contend that Montana Power never acknowledges, much less demonstrates, that it has overcome the rebuttable presumption against it arising from the termination provisions in the Cooperatives' contracts. According to the Cooperatives, Mr. Corcoran's testimony is not persuasive evidence that overcomes this presumption, and the cases cited by Montana Power to support Mr. Corcoran's testimony are factually inapposite and are not controlling precedent for this proceeding.

### **Commission Decision**

15. We affirm the ALJ's finding that Montana Power has not met its prima facie burden to establish that it had a reasonable expectation that either of the contracts with the Cooperatives would last past their potential terms. The Commission stated in Order No. 888-A that a utility seeking to recover stranded costs must demonstrate that it had a reasonable expectation of continuing to serve a customer.<sup>11</sup> Whether a utility has a reasonable expectation of continuing to serve a customer, and for how long, will be determined on a case-by-case basis, and will depend on all of the facts and

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<sup>10</sup> Montana Power cites to Central Vermont Public Service Corporation, 95 FERC ¶63,005 at 65,040-47 (2001) (Central Vermont); City of Alma, Michigan, 88 FERC ¶ 63,002 at 65,013-17 (1999), aff'd, 96 FERC ¶ 61,163 at 61,712 (2001) (City of Alma); City of Las Cruces, New Mexico, 83 FERC ¶ 63,017 at 65,200-02 and 65,205-06 (1998), aff'd, 87 FERC ¶ 61,201 at 61,746-47 (1999) (City of Las Cruces); Puget Sound Power & Light Company, 78 FERC ¶ 63,001 at 65,011-13 (1997) (Puget).

<sup>11</sup> See Order No. 888-A, FERC Stats. & Regs., Regulations Preambles July 1996-December 2000 ¶ 31,048 at 30-421. See also Order No. 888, FERC Stats. & Regs., Regulations Preambles January 1991 – July 1996 ¶ 31,036 at 31,831.

circumstances.<sup>12</sup> The existence of a notice provision in a contract creates a rebuttable presumption that the utility had no reasonable expectation of serving the customer beyond the specified period. In addition, as we stated in Order No. 888-A, the inclusion of an “evergreen” clause or other automatic renewal provision is a factor to be considered in determining whether the presumption of no reasonable expectation is rebutted in a particular case.<sup>13</sup> We will look at other factors as well.

16. As noted by the ALJ in this case, the only witness proffered by Montana Power on the issues of rebuttable presumption and reasonable expectation was Mr. Corcoran. Based on her review of that testimony, the ALJ found that “Mr. Corcoran’s conclusory statements cannot meet the heavy burden the regulations place on Montana [Power] on this issue.”<sup>14</sup> Other than Mr. Corcoran’s testimony, there is no other evidence in the record to show Montana Power had a reasonable expectation to continue serving the Cooperatives. Montana Power did not offer any documentary or other support for the assertions in Mr. Corcoran’s testimony. We find that Mr. Corcoran’s testimony, standing on its own, does not constitute evidence sufficient to rebut the presumption, based on the notice provision in each contract of no reasonable expectation.<sup>15</sup> Therefore, we affirm the ALJ’s finding that Mr. Corcoran’s conclusory testimony did not constitute sufficient evidence of a “reasonable expectation.”

17. In light of our decision to affirm the ALJ’s decision to summarily dismiss Montana Power’s case for failure to establish reasonable expectation, we need not reach or decide the other issues determined by the ALJ. Accordingly, we will not affirm or reject them.

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<sup>12</sup> Id. at 30,421.

<sup>13</sup> Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,421 (1997).

<sup>14</sup> Initial Decision, 101 FERC ¶ 63,015 at P 63.

<sup>15</sup> With regard to Montana Power’s argument in its brief on exceptions that factors such as those in Mr. Corcoran’s testimony have been found in other cases to support reasonable expectation, we find that the cases cited by Montana Power are inapposite and not applicable to the facts in this case. For example, City of Alma and City of Las Cruces (which are retail-turned-wholesale stranded costs cases) did not involve a contractual notice provision giving rise to the presumption of no reasonable expectation of continuing to serve the customer. The Puget and Central Vermont cases cited by Montana Power are ALJ decisions, not Commission decisions.

The Commission orders:

We affirm the ALJ's Initial Decision to summarily dismiss Montana Power's claim for stranded costs.

By the Commission.

( S E A L )

Linda Mitry,  
Acting Secretary.